

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 21, 2007

**ANNE MCLEAY v. METROPOLITAN HOSPITAL AUTHORITY**

**Appeal from the Chancery Court for Davidson County**  
**No. 03-129-III Ellen Hobbs Lyle, Chancellor**

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**No. M2006-01369-COA-R3-CV - Filed November 20, 2008**

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In this action for common law writ of certiorari, petitioner appeals the trial court's holdings that petitioner was justly terminated and that the *de novo* hearing in the trial court cured any due process flaws that may have existed in the administrative proceedings below. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Martin D. Holmes, Nashville, Tennessee, for the appellant, Anne McLeay.

Rita Roberts-Turner, James Earl Robinson, John Lee Kennedy, Department of Law of the Metropolitan Government of Nashville and Davidson County, for the appellee, Metropolitan Hospital Authority.

**MEMORANDUM OPINION<sup>1</sup>**

Anne McLeay was employed as a physician's assistant at Nashville General Hospital, which is operated by the Metropolitan Hospital Authority ("Hospital"), in 2002. After an incident in which Ms. McLeay completed a surgical consent form for a non-English speaking patient without the presence, supervision, or approval of a physician, she received notice that she was charged with insubordination, neglect or disobedience of instructions by supervisors and violation of regulations

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<sup>1</sup>Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

and procedures of the Hospital. A disciplinary hearing was held by the Chief Nursing Officer on November 11, 2002, that resulted in Ms. McLeay's termination on November 13, 2002.<sup>2</sup> Ms. McLeay then appealed her termination to the Hospital's Chief Executive Officer ("CEO") at which hearing she was represented by counsel and allowed to present evidence. Ms. McLeay's termination was upheld by the Hospital's CEO.

On January 13, 2002, Ms. McLeay filed a petition for certiorari in Chancery Court against the Hospital because of her termination. Ms. McLeay's petition for certiorari under Tenn. Code Ann. § 27-8-101 and § 27-9-101 sought review of the administrative decision to terminate her employment on the basis that she was deprived of due process and that the decision was fraudulent, illegal, arbitrary and capricious, and unsupported by substantial and material evidence. According to Ms. McLeay, she was terminated due to unlawful retaliation. The Hospital filed the administrative record of the proceedings below.

On July 15, 2002, Ms. McLeay filed a motion seeking a continuance and permission to present additional proof in these proceedings. In that motion, Ms. McLeay described a "companion" case she had filed in circuit court against the Hospital based on the same facts wherein she was seeking monetary damages for her "retaliatory discharge" by the Hospital ("Circuit Court Action"). Ms. McLeay stated that the Circuit Court Action was scheduled for trial, and she requested a continuance in this certiorari proceeding on the basis that if she prevailed in the Circuit Court Action, then her certiorari petition could be rendered moot. In the Circuit Court Action,

Plaintiff [Ms. McLeay] filed suit against her employer for common law and statutory retaliatory discharge, violation of 42 U.S.C. § 1983, tortious interference with an employment contract, defamation, and negligence after being terminated from her position as a physician assistant.

*McLeay v. Huddleston*, M2005-02118-COA-R3-CV, 2006 WL 2855164, at \* 1 (Tenn. Ct. App. Oct. 6, 2006) (perm. app. denied Feb. 26, 2007).

At the same time, Ms. McLeay sought permission to introduce additional proof under the Administrative Procedures Act ("APA"), Tenn. Code Ann. § 4-5-322(g),<sup>3</sup> on the basis that that provision allows additional proof "in cases of alleged irregularities in procedure before the agency." Ms. McLeay alleged the administrative hearings she received below "were nothing more than shams to terminate her employment based on retaliatory motives." She specified that the proof she wished to introduce was garnered in discovery in the Circuit Court Action.

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<sup>2</sup> At that hearing, several witnesses and Ms. McLeay gave statements or testimony.

<sup>3</sup> Although the action was brought as a common law writ of certiorari action, the motion and supporting brief relied on provisions and standards applicable to judicial review of contested case decisions under the APA.

The trial court denied Ms. McLeay's continuance request since the Hospital had been granted summary judgment in the Circuit Court Action, but granted a continuance of the final hearing based on a scheduling conflict with an attorney. The trial court denied Ms. McLeay's request to present additional proof since review of an administrative decision proceeds on the record "unless there is fraudulent, illegal or irregular conduct which occurred extrinsic to the record . . . . No such circumstances have been argued by the petitioner to warrant consideration of matters outside the record."

Later, the court continued the final hearing to allow Ms. McLeay to file a motion to alter or amend the order excluding proof outside the record, and she was directed to identify by page all the deposition excerpts and specifically identify any other evidence outside the record which she sought to have made a part of the record.

Thereafter, the trial court granted Ms. McLeay leave to file a Third Amended Petition, over the Hospital's objections. In the Third Amended Petition, Ms. McLeay alleged that because of procedural irregularities in the administrative hearings she had been unable to present evidence and that through the Circuit Court Action she had been able to garner evidence "which would exonerate her from any wrongdoing which served as the alleged basis for her termination." The Third Amended Petition included factual allegations surrounding the incident that led to her discharge. The Hospital noted that the Third Amended Petition was an attempt to keep the allegations alive that had been dismissed in the Circuit Court Action.<sup>4</sup>

Ms. McLeay also asked the trial court to reconsider its order excluding additional evidence. The Petition included elaborate factual allegations, some attempting to dispute the facts surrounding the surgical consent form that was the immediate basis of her termination (in other words challenging the merits of the administrative decision), some pertaining to the procedures surrounding the hearings at the administrative level, and some offered in support of her claim of retaliatory discharge.

The Hospital responded by pointing out that Ms. McLeay had not raised at the administrative hearings any of the matters she now said were the real cause of her dismissal and argued that Ms. McLeay had "failed to show how any of her new allegations are material to the issue of whether she improperly generated a surgery consent form for a non-English speaking patient" or why she failed to bring up her allegations of immoral or negligent conduct in her administrative hearings. The Hospital also submitted the Circuit Court's final orders "as evidence of the irrelevancy of the plaintiff's proposed additional evidence." It was the Hospital's position that the case should proceed on the previously filed administrative record.

On November 4, 2005, the trial court granted Ms. McLeay's request to submit evidence in addition to the administrative record, describing the request as covering "*de novo* proof that the

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<sup>4</sup>The Third Amended Petition clearly relied upon facts outside the administrative record in an attempt to show retaliation, a claim that had been found groundless in the Circuit Court Action.

defendants were motivated by malice and retaliation in terminating the petitioner, and *de novo* proof of procedural irregularities not contained in the record developed below.” The trial court imposed some “regulations” to assure that the Hospital had notice and discovery of any new evidence and “to maintain the limited scope of a hearing on a writ of certiorari.” The trial court ordered that the witnesses testify in court, rather than through deposition, and that the parties provide a witness list for the *de novo* hearing. Each side was limited to two hours for direct examination and one-half hour of cross examination for each witness.

Perhaps because both parties had argued the additional evidence issue, including in the Hospital’s motion to alter or amend that order and Ms. McLeay’s response to that motion, by reference to Tenn. Code Ann. § 4-5-322,<sup>5</sup> it appeared unclear to the trial court whether Ms. McLeay was challenging the administrative decision to terminate her employment under the Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 *et seq.*, or by a writ of certiorari. Consequently, the trial court filed an order dated December 20, 2005 asking Ms. McLeay to file a notice stating whether her cause of action was a petition for a writ of certiorari or a petition for judicial review of an administrative order under Tenn. Code Ann. § 4-5-322. In January of 2006, Ms. McLeay filed a notice that she was proceeding under a common law writ of certiorari.

The trial court then conducted an evidentiary hearing *de novo* and issued its Memorandum and Order on May 10, 2006, wherein it considered the record and the witnesses presented by the parties. The final order addressed three components of the parties’ positions. First, the court described the respective positions regarding the basis for Ms. McLeay’s termination: Ms. McLeay alleged she had been fired in retaliation for reporting unethical, criminal conduct committed by the Hospital, while the Hospital asserted those allegations were false and that she had been fired for exceeding her authority as a physician’s assistant and usurping the role of physician. As to that issue, the trial court found that Ms. McLeay was not credible and that the court did not believe her testimony that the Hospital had acted unethically and criminally. The court also concluded that Ms. McLeay’s discharge “was not pretextual but was appropriate.”

As to Ms. McLeay’s allegations of procedural irregularity in the administrative hearing, she alleged she had been denied adequate notice of the hearings and the opportunity to present a defense, depriving her of due process. The trial court found that the Hospital had violated Ms. McLeay’s due process rights by not providing her an opportunity to cross examine witnesses and by failing to notify her of the expanded scope of the second, or administrative appeal, hearing before the agency. However, the court found that any due process violations had been cured because Ms. McLeay had been given “an opportunity *de novo* to present all her claims and defenses” in the hearing conducted by the trial court. Consequently, the court determined that the due process deficiencies had been

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<sup>5</sup> While Ms. McLeay maintained that her action was a common law writ of certiorari, she asked to introduce evidence from the Circuit Court Action to establish “procedural irregularities,” which is a ground for additional proof under the APA, Tenn. Code Ann. § 4-5-322(g). The Hospital objected to the request by also relying upon APA standards. The trial court rebuffed the Hospital’s objection on the basis its objection was “premised on the assertion that the case is controlled not by principles of certiorari but the Uniform Administrative Procedure Act and that premise contradicts the pleadings.”

rendered moot, stating the “the trial de novo conducted by this Court ‘readjudicated the matter in a neutral forum, completely eliminating any arbitrariness or capriciousness in the board’s decision’ such that the petitioner’s claims of inadequacy of notice and violation of due process have been cured,” citing *Phillips v. State Board of Regents*, 863 S.W.2d 45, 50-51 (Tenn. 1993). Accordingly, the trial court dismissed “the petitioner’s claims of violation of due process.”

Finally, the court addressed the defense of collateral estoppel raised by the Hospital. After quoting authority on the issue, the trial court held that it was unable to dismiss the case on the basis of collateral estoppel because the Hospital had failed to provide “a detailed analysis and comparison of the facts and issues in the circuit court case which it contends are applicable to this case.”

The court dismissed the petition, concluding that the Hospital did not act arbitrarily, capriciously, or illegally or in excess of its authority in terminating Ms. McLeay’s employment and that any due process deprivations had been cured by the proceedings in the trial court. Ms. McLeay has appealed.

#### ANALYSIS

As our previous recounting of this case’s progress in the trial court may suggest, this case took some unusual turns, and, as a result, a number of potential issues could present themselves. Some issues simply were not raised below, and many of the more problematic aspects of this case were not raised in this appeal, presumably because the Hospital was ultimately successful below. While this appeal will be decided based on the issues raised by the parties, our disposition on those bases should not be read as affirming, approving, or otherwise addressing the treatment of any issues by the trial court or the parties below.

We begin by repeating that this action was a common law writ of certiorari action brought pursuant to Tenn. Code Ann. §27-8-101 *et seq.*, which governs the extraordinary remedy of common law writ of certiorari, and § 27-9-101 *et. seq.*, providing procedures for review, by writ of certiorari, of decisions by boards and commissions. Accordingly, the trial court’s review was limited by the rules governing certiorari actions:

Under the limited standard of review in common law of writ of certiorari proceedings, courts review a lower tribunal’s decision only to determine whether that decision maker exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Petition of Gant*, 937 S.W.2d 842, 844-45 (Tenn. 1996), *quoting McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990); *Fallin v. Knox County Bd. of Com’rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm’n.*, 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (1953); *Lafferty v. City of Winchester*, 46 S.W.3d 752, 758-59 (Tenn. Ct. App. 2001); *Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals*, 955 S.W.2d 52, 54 (Tenn. Ct.

App. 1997); *Hemontolor v. Wilson Co. Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994).

Under the certiorari standard, courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Powell v. Parole Eligibility Rev. Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994); (2) reweigh the evidence, *Watts v. Civil Serv. Bd. for Colum.*, 606 S.W.2d 274, 277 (Tenn. 1980); *Hoover, Inc. v. Metro Bd. of Zoning App.*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996); or (3) substitute their judgment for that of the lower tribunal. *421 Corp. v. Metropolitan Gov't of Nashville*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000). It bears repeating that common law writ of certiorari is simply not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker. *Powell*, 879 S.W.2d at 873; *Yokley v. State*, 632 S.W.2d 123, 126 (Tenn. Ct. App. 1981).

*Moore & Associates, Inc. v. West*, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005).

A court's review of a lower tribunal's decision under the common law writ of certiorari is limited to questions of law. *Watts v. Civil Service Board for Columbia*, 606 S.W.2d 274, 276 (Tenn. 1980). Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency. *Id.* at 277. Our scope of review is the same. *Id.*

The trial court did not mention in its final order any proof from the administrative record or indicate there was material evidence in the record to support the termination decision. Instead, the court discussed the testimony taken in the hearing before it and relied on its evaluation of that testimony.

Nonetheless, we have reviewed the record created at the administrative level and find that there was material evidence introduced upon which to terminate Ms. McLeay's employment. The emergency room attending physician and others present at the time of the completion of the surgical consent form testified as to the events surrounding that form, Ms. McLeay's failure to discuss the patient with the attending before contacting a surgeon, the consequences of the completion of the form without the surgeon or the attending present, including the administration to the patient of pre-surgery medication and the avoidance of procedures usually performed by nurses. They also explained how Ms. McLeay had been previously instructed on the proper procedures and the necessity for those procedures. While Ms. McLeay offered various explanations or claimed misunderstandings on her part, she did not rebut the basic facts regarding the completion of the form or her failure to discuss the patient with the attending physician.<sup>6</sup> Her statements included

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<sup>6</sup>Of course, even if she disputed the testimony of others, their testimony would still constitute material evidence to support the Hospital's decision.

recounting her version of several prior occurrences whose relevance was not readily apparent. The decision to terminate her employment was supported by material evidence.

As is clear from the trial court's final order, the court based its decision regarding Ms. McLeay's termination on the "*de novo* proof" taken in court. The trial court allowed the taking of evidence because it found that Ms. McLeay had "made a colorable claim" that her termination was motivated by malice and retaliation and that the decision was based on procedural irregularities not contained in the administrative record. It is debatable whether the trial court's decision to hear additional evidence beyond that contained in the administrative record was appropriate as to the issue of the merits of the termination itself.

Generally, under the common law writ of certiorari, the reviewing court is limited to the record made before the administrative body below. *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983); *B.J. Boyd v. General Motors Acceptance Corp.*, 330 S.W.2d 13, 17 (Tenn. 1959); *Brigham v. Lack*, 755 S.W.2d 469, 471 (Tenn. Crim. App. 1988). The "grant" of the writ is simply an order requiring the respondent to send up its record for review. Tenn. Code Ann. § 27-9-109; *Hawkins v. Tenn. Dep't. of Correction*, 127 S.W.3d 749, 757 (Tenn. Ct. App. 2002). The purpose of the writ is to have the record placed before a reviewing court so that the court can decide whether relief is appropriate. *Hawkins*, 127 S.W.3d at 757.

The introduction of additional evidence beyond that in the administrative record is limited in scope because of the limited scope of review in a certiorari action. "Any additional evidence introduced in the court granting certiorari must necessarily be limited to the legal question presented, to-wit; whether the administrative agency . . . exceeded . . . its jurisdiction or acted illegally or arbitrarily." *Peoples v. Bank of VanLeer*, 397 S.W.2d 401, 406 (Tenn. Ct. App. 1965); *Davison*, 659 S.W.2d at 363. "Courts have limited the introduction of additional evidence to the question of whether the Board exceeded its jurisdiction or acted illegally, arbitrarily or capriciously." *Weaver v. Knox Co. Bd. of Zoning Appeals*, 122 S.W.3d 781, 786 (Tenn. Ct. App. 2003) (quoting *Hemontolor v. Wilson Co. Bd. of Zoning Appeals*, 883 S.W.2d 613, 618 (Tenn. Ct. App. 1994); *Watts v. Civil Service Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980) Since the reviewing court may not inquire into the correctness of the decision, it follows that extrinsic evidence cannot be introduced to show that the administrative decision was wrong.

The narrow exceptions that allow extrinsic proof to supplement the record on a common law writ of certiorari must be handled substantively so as to prevent their erosion. In other words, a request to submit additional proof should not be allowed where it is a subterfuge to effectuate relitigation of the merits of the administrative decision. There is some question in this case as to whether the issue of the cause of Ms. McLeay's termination was properly subject to additional proof and relitigation in the trial court. Since there was material evidence in the administrative record to support the Hospital's decision to fire Ms. McLeay, the "matter is foreclosed unless the [agency] has acted fraudulently, illegally or arbitrarily." *Watts*, 606 S.W.2d at 281; *see also Weaver v. Knox County Bd. of Zoning Appeals*, 122 S.W.3d 781, 786 (Tenn. Ct. App. 2003) (holding that a trial court cannot consider evidence not presented to the lower tribunal in determining whether material

evidence in the record supports that tribunal's decision). Additionally, Ms. McLeay did not raise her allegations of retaliation in the administrative proceedings.<sup>7</sup>

In any event, the trial court heard the evidence as to the cause of Ms. McLeay's firing and made a number of findings of fact regarding the incident leading to Ms. McLeay's termination, including:

The plaintiff was charged and found guilty by the Hospital of completing the entirety of a surgical consent form outside the presence of and without the authority of a surgeon. The Hospital's proof establishes that there are certain parts of the form which only the surgeon can discuss and complete with the patient because the surgeon knows all of the treatment complications. Additionally, the surgical consent form, once completed, triggers the administration of drugs and anesthesia. If the form is completed without the input of a surgeon, drugs are administered outside the knowledge and presence of the surgeon.

The trial court stated it did not believe Ms. McLeay's testimony surrounding the consent form and specifically credited the testimony of Dr. Moore "who testified before the court" that he did not authorize Ms. McLeay to complete the entire form and that the infraction was a serious one because it places a patient in jeopardy and that it, in and of itself, merited a discharge.

In this appeal Ms. McLeay argues that the trial court erred in its independent conclusion that her termination was not retaliatory. Ms. McLeay was afforded an opportunity to present witnesses, including herself. The trial court simply did not believe her; instead, it believed the witnesses presented by the Hospital. Given the credibility issue here as well as our review of the evidence, we cannot find that the evidence presented in the *de novo* hearing preponderates against the trial court's conclusions. Tenn. R. App. P. 13(d); *Clark v. Nashville Machine Elevator Co. Inc.*, 129 S.W.3d 42, 46 (Tenn. 2004); *Jones v. Garrett*, 92 S.W.2d 835, 839 (Tenn. 2002).

Accordingly, we affirm the trial court's holding that Ms. McLeay's termination was based on her failure to follow policies and procedures and was, therefore, justified. Stated another way, we affirm the trial court's denial of relief to Ms. McLeay in this writ of certiorari action.

Ms. McLeay's other argument on appeal is that the due process error in the administrative proceedings below was not cured by the *de novo* hearing held by the trial court. While it is not clear to us from the record below that Ms. McLeay had a property interest in retaining her job sufficient

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<sup>7</sup> She did, however, bring a separate lawsuit claiming retaliatory discharge.



to invoke constitutional due process protections,<sup>8</sup> we need not resolve that question in order to decide the issues raised in this appeal.

Ms. McLeay was given a *de novo* hearing in the trial court on her termination, whether or not she was entitled to it under the rules governing common law writ of certiorari. While the trial court found that Ms. McLeay had not received adequate notice of the scope of the second administrative hearing and had not been given the opportunity to cross-examine witnesses against her, the court found those inadequacies had been cured by the proceeding in the trial court.

Two fundamental requirements of due process in the context of termination of employment that involves a property interest in its continuation are notice and an opportunity to be heard. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 787 (Tenn. 1999); *Phillips v. State Bd. of Regents*, 863 S.W.2d at 50-51. The primary purpose of the notice requirement is “to allow the affected party to marshal a case” against the firing. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d at 787. Whether or not the notice Ms. McLeay received was constitutionally adequate is not before us in this appeal. We note, however, that Ms. McLeay did not raise the issues of inadequate notice, the scope of the hearing, or cross-examination at the hearing before the Hospital CEO. Generally, issues cannot be raised for the first time in a proceeding to review an administrative agency’s decision, and administrative decision makers must be given the opportunity to correct any procedural errors at the administrative level. *McClellan v. Bd. of Regents*, 921 S.W.2d 684, 690-91 (Tenn. 1996).

Even if we assume that there was a denial of due process in the administrative proceedings and also assume that Ms. McLeay could raise that denial for the first time on judicial review, it is well settled that “[e]laborate procedures at one stage may compensate for deficiencies at other stages.” *Phillips v. State Bd. of Regents*, 863 S.W.2d at 50 (quoting *Armstrong v. Manzo*, 380 U.S.

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<sup>8</sup>The trial court’s final order recounts that the parties disputed whether Ms. McLeay qualified for protection under civil service rules, and the record documents that dispute. As early as the second administrative hearing, Ms. McLeay and her attorney were informed that under Hospital policy licensed professionals, including physician assistants, were not covered by the Hospital’s civil service rules and procedures. In some of her filings, Ms. McLeay acknowledges that the Hospital asserted that she was not entitled to the same rights as a civil service employee. Her response was that, despite being an “at will” employee, she was still a public employee and, therefore, entitled to certain due process rights before she could be terminated. Her conclusion that all public employees have a property interest in continued employment sufficient to trigger due process is simply wrong.

A property interest entitled to due process protection must be more than a “unilateral expectation” or an “abstract need or desire;” instead, it must be a “legitimate claim of entitlement.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Rowe v. Bd. of Educ. of Chattanooga*, 938 S.W.2d 351, 354 (Tenn. 1996); *Martin v. Sizemore*, 78 S.W.3d 249, 262 (Tenn. Ct. App. 2001). That entitlement must be created in state law, including policies or regulations, that establish that a deprivation of the specific benefit, herein continued employment, must be based on cause. *Sizemore*, 78 S.W.3d at 262. Obviously, an at-will employee does not have a legitimate entitlement to continued employment. Ms. McLeay admitted in her filings that she was an at-will employee, but asserted that as a governmental employee she was entitled to procedural due process. The trial court decided that the Hospital had waived any right to assert that its civil service rules did not apply to Ms. McLeay because it had voluntarily “agreed to apply them,” based on language in a letter from the Hospital to Ms. McLeay sent after her first administrative hearing.

545, 552, 83 S.Ct. 1187, 1191 (1965)). In both *Phillips* and *Wells*, the tenured teachers received hearings at the administrative level and a *de novo* review at the trial court level, including the opportunity to present additional evidence, in accordance with statutory procedures governing termination of tenured teachers. The Tennessee Supreme Court, in both cases, found that any alleged procedural deficiencies in the administrative proceedings, including the adequacy of notice, had been cured by the trial court proceedings. *Wells*, 9 S.W.3d at 787; *Phillips*, 863 S.W.2d at 50-51.

In this appeal, Ms. McLeay argues that the boundaries set by the Chancellor on the hearing in the trial court deprived her of a meaningful hearing, and also argues that the lapse of years between the *de novo* hearing and the termination could not be cured. Although the trial court set limitations on the time allowed for examination of witnesses, Ms. McLeay did not object to these limitations. She was allowed to present evidence in court, including her own testimony, even though many of those witnesses had appeared at the administrative hearings. She was also allowed to present evidence outside, or additional to, the administrative record. While Ms. McLeay may now take issue with the boundaries set by the trial court, it is clear that she was afforded abundant opportunity to present her case before a neutral judge. She has not demonstrated how those limitations deprived her of the opportunity to present evidence to support her allegations. Also, the record shows that the delays in hearing this matter were occasioned by Ms. McLeay's actions. Consequently, we agree with the trial court that any alleged procedural deficiencies at the administrative level were cured by the *de novo* hearing in the trial court.

Ms. McLeay was afforded two hearings at the administrative level, and she was represented by counsel at the second. She was given a hearing in the trial court in this proceeding to present evidence to establish her allegations of retaliation or to rebut the proof of conduct justifying termination. Additionally, she brought a separate lawsuit in another court alleging, *inter alia*, retaliatory discharge, and the dismissal of that lawsuit received full appellate review. She has received a great deal of process and had ample opportunity to present her case.

In this appeal, the Hospital filed a motion to dismiss the appeal on the ground of collateral estoppel in view of the appellate decision in the Circuit Court Action.<sup>9</sup> The dismissal of Ms. McLeay's claims in the Circuit Court Action was affirmed on appeal in *McLeay v. Huddleston*, 2006 WL 2855164. In that opinion this court held that (1) Ms. McLeay failed to establish either an exclusive causal connection between her discharge and her alleged refusal to participate in illegal practices or that her exercise of rights was a substantial factor in her discharge; (2) she was terminated because she violated hospital policies and procedures by improperly initiating a surgery consent form, and her prior evaluation had included a number of areas needing improvement; (3) she failed to establish that the Hospital had any policy or practice that impinged upon or violated her free speech, due process, or equal protection rights, thereby failing to establish a cause of action under § 1983; and (4) she had failed to establish that the Hospital had published any defamatory information about her and failed to present proof of injury.

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<sup>9</sup>In certain circumstances, a party may assert collateral estoppel for the first time on appeal. See *First N. B. S. Corp. v. Gabrielsen*, 225 Cal. Rptr. 254, 256-57 (Cal. App. Dist. 1 1986).

We decline to dispose of this appeal on the basis of the motion to dismiss. While some of the issues Ms. McLeay litigated in this action, *i.e.*, whether her termination was the result of wrongful retaliation, were the subject of the Circuit Court action, it is not entirely clear that all of Ms. McLeay's issues were. We have determined this appeal based on examination of all the issues raised by Ms. McLeay.

The result reached by the trial court is affirmed. Costs of appeal are assessed against Anne McLeay, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.